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IN THE

Supreme Court of the United States

October Term, 1946

No.....

MASON & DIXON LINES, INCORPORATED,
Petitioner

vs.

COMMONWEALTH OF VIRGINIA
At the Relation of
STATE CORPORATION COMMISSION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF MATTERS INVOLVED

I.

This is an action to annul and set aside a final order and judgment and penalty assessed by the Corporation Commission of Virginia against petitioner, a Tennessee corporation, exclusively engaged in interstate commerce, wherein petitioner has been ordered to pay certain assessments or penalties on motor fuel (gasoline) which fuel is alleged to have been used in Virginia but not purchased in Virginia, and

for a declaratory judgment holding that petitioner is not liable to pay such assessments or penalties.

The respondent purported to act under the provision of Chapter 108 of the Acts of the General Assembly of Virginia of 1942, the pertinent parts of which are included in the appendix to this petition. (See Appendix B)

In brief, the Act assailed provides that every motor carrier operating in Virginia, for compensation, shall purchase in Virginia an amount of gasoline at least equivalent to the amount used in Virginia, or in lieu thereof to pay an amount equivalent to what the prevailing Virginia state tax would have been had the gasoline been purchased in Virginia. This statute is entirely separate and apart from a general law of Virginia imposing an excise tax on the sale of gasoline as provided by Chapter 212 of the Acts of 1932.

Virginia claims a penalty of $27,958.93 from petitioner, in excess of the amount paid by petitioner and credited to petitioner on gasoline purchased and used in Virginia. There has been assessed against petitioner an additional penalty or fine of $1,000 for failure to pay on the basis directed by the Virginia Corporation Commission.

Petitioner purchased in Virginia and paid the Virginia tax on an amount of gasoline in excess of that used by petitioner in Virginia but petitioner sold the excess amount so purchased. The record does not show what, if any, part of the sold gasoline was used in Virginia by others, however that question is without significance with respect to the principal issue presented.

By application of a formula, devised (not provided by statute) by the Virginia Corporation Commission and based on petitioner's twelve state system operations, said Commission now determines that petitioner failed to purchase in Virginia or pay the penalty on gasoline constructively used in Virginia, as determined by the formula. Petitioner reported on forms prescribed by the Virginia Corporation

Commission that it operated 13,636,636 miles in Virginia and used in such operations 2,381,385 gallons of gasoline (5.7 miles per gallon). Petitioner also reported that it operated 35,396,562 system miles and used 7,631,767 gallons of gasoline (4.63 miles per gallon).* In applying the Virginia law to petitioner, the Virginia Commission insists that petitioner must purchase in Virginia an amount of gasoline (or pay the penalty) equal to its system average of gasoline purchased in relation to system miles operated. Pursuing this theory the Virginia Commission found that petitioner's system average was less miles per gallon of gasoline than that represented by petitioner's net purchases in Virginia and that petitioner should have purchased in Virginia 2,940,563 gallons of gasoline instead of 2,381,385 which results in a deficit of 559,178.57 gallons at 5 cents per gallon or $27,958.93.

From the foregoing judgment and assessment by the State Corporation Commission petitioner appealed to the Supreme Court of Appeals of Virginia, which court sustained the State Corporation Commission.

Below petitioner contended that the Virginia statute, on its face, was unconstitutional as a regulation of interstate commerce in that it deprived petitioner of its constitutional right to choose the market wherein it might purchase gasoline for its operations. (R p 6) That the statutory provision permitting petitioner to pay to Virginia the prevailing Virginia gasoline tax, in lieu of purchases in Virginia, did not cure the statutory defect for the reason that the penalty

*Note: In the Opinion of the trial court (R p 38) petitioner's system miles are stated as 33,396,562. Through apparent typographical error the second digit from the left was written "3" instead of "5". This error was again repeated in the Opinion of the Chief Justice of the Supreme Court of Appeals of Virginia (R p 53). The correct figures are set forth in Exhibit No. 2, Masten, (R p 34), being the sum of the totals listed under the heading of "Total Miles Intercity (over-road)".

so imposed necessarily had the practical effect of compelling petitioner to purchase gasoline in Virginia. (R p 7-8) All states have gasoline taxes and the duplication of such taxes deprive petitioner of its discretion and choice of markets.

Petitioner further contended that the statute as applied by the State Corporation Commission, by use of a system formula, (R p 27) imposed an unreasonable burden on interstate commerce and deprived petitioner of property without due process of law in that the basis for computing petitioner's liability on a system basis was arbitrary and capricious and was without support in fact or reason. (R p 8)

The court below took the position that the exaction was in the nature of compensation for the use of the highways and therefore lawful. (R p 57) The court disregarded petitioner's contention that the means (control of the purchase of gasoline) chosen by the State was an unconstitutional method of collecting compensation for the use of the highways. With respect to petitioner's further contention that the statute as applied, on a system basis, imposed an unreasonable burden on interstate commerce, the court contented itself by saying that the petitioner had not heretofore challenged the form of reports required by Virginia. (R p 55) The court apparently entertained the view that petitioner was under an obligation to anticipate an audit and assessment on a system formula basis, which might produce a different result from those indicated by the petitioner's Virginia mileage and petitioner's purchase in Virginia, of gasoline.

Petitioner contended below that the Virginia Corporation Commission had no statutory authority to either enlarge or restrict the application of the statute and that by limiting the scope of the Act and imposing the exaction only on interstate carriers, and in broadening the Act by computing the exaction on a system basis, such administration violated

petitioner's rights under the Virginia Constitution. (R p 5, 8) The court below disregarded these contentions.

Petitioner further contended that the statute as applied was discriminatory as to interstate commerce because as applied and as disclosed by the forms prescribed by Virginia (Exhibit 3) only interstate carriers, for-hire, were required to make reports respecting their Virginia mileage and gasoline purchases in Virginia. Intrastate carriers, both private and for-hire, and private interstate carriers, retain their freedom to choose the market in which they might purchase gasoline. (R p 35) The court below disposed of this point by referring to the fact that the statute which on its face, may not be discriminatory and disregarded the actual application of the statute. (R p 45)

Subsequent to the date of assessment and judgment against petitioner by the Virginia State Corporation Commission but prior to the decision by the Supreme Court of Appeals of Virginia, the Virginia Legislature repealed the act in controversy, without a savings clause, and therefore there is now presented a further question respecting the legality of the judgment of the Supreme Court of Appeals of Virginia, under a repealed statute. The repealing statute is reproduced in the appendix to this petition.

This petition is to seek a review of the decision by the Supreme Court of Appeals of Virginia.

II.
STATEMENT OF JURISDICTION

This Court has jurisdiction to grant this petition for certiorari and to hear this appeal by virtue of the provisions of 28 U.S.C.A. 344 (Judicial Code, Section 237), which authorizes this Court, upon petition of a litigant, to cause a case to be certified to it from the highest court in a State.

The judgment of the Supreme Court of Appeals of Vir-

ginia sought to be reviewed was entered on January 13, 1947, and this petition is being filed in the office of the Clerk of this Court within three months of the entry of said judgment, as provided for in 28 U.S.C.A. 350.

III.
THE QUESTIONS PRESENTED

There are five questions which the petitioner desires to present to this Court if certiorari is granted.

1. The statute is, on its face, unconstitutional under the "Commerce Clause" of the Constitution of the United States in that it directly and substantially regulates the sale, purchase and use of gasoline in interstate commerce and deprives petitioner of its constitutional right to purchase gasoline in a free market.

2. The determination of petitioner's tax liability on the basis of a twelve state system formula, in derogation of petitioner's reports by states, is, on its face, unconstitutional in that it imposes an undue and unreasonable burden on interstate commerce and is not a proper measure of compensation for the use of highways in the State of Virginia.

3. The statute, as applied, to interstate carriers for-hire discriminates against interstate commerce in that said statute is not applied to other kinds of motor carriers.

4. The statute under which the deficiency assessment and judgment was levied by the State Corporation Commission was repealed subsequent to the determination of said deficiency judgment but prior to decision in the matter by the Supreme Court of Appeals of Virginia. The repealing statute contained no savings clause and petitioner contends that the State is without jurisdiction to collect the deficiency assessment.

5. The Act as applied by the State Corporation Commission is in violation of the Virginia and Federal Constitutions in that the State Corporation Commission has no authority to diminish the scope of the Act as to carriers, nor to devise a formula which augments the imposition provided by the Act.

IV.
REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

This case raises the question whether the State may constitutionally require the purchase of gasoline in Virginia or exact a penalty per gallon on gasoline not purchased in the State. In this case gasoline was purchased by a foreign corporation exclusively engaged in interstate commerce, into and through the state, and under the guise of obtaining compensation for the use of highways within the state, the state seeks to control the sale of gasoline. The lower court held that the state was entitled to reasonable compensation for the use of the highways within the state. (R p 56 et seq.) The opinion of the court indicates that the court conceived that compensation for the use of highways was the issue involved, whereas no such issue was before the court. The issue actually presented was whether the state could regulate interstate commerce by dictating to an interstate carrier where it should purchase its gasoline, or upon failure to purchase gasoline in Virginia to pay as a penalty the prevailing state tax on gasoline.

This Court may judicially notice that all states impose taxes on gasoline sold to the owners and operators of motor vehicles and that the states do not abate their taxes because the gasoline may be used outside of the taxing state, and neither does Virginia. The Virginia statute simply meant that every interstate carrier that purchases a gallon of

gasoline outside of Virginia, for use in Virginia must pay the tax imposed by the State in which the purchase was made and then have superimposed on that tax Virginia's penalty of 5¢ per gallon. The economic result of the Virginia statute is to compel every interstate carrier to purchase its gasoline from a Virginia dealer in gasoline regardless of whether better terms on gasoline might be obtained elsewhere, and this, petitioner contends Virginia cannot do.

If Virginia can constitutionally compel an interstate carrier to purchase gasoline in Virginia, then presumably Virginia can constitutionally compel interstate carriers to purchase their oil, tires, trucks, parts, anti-freeze, etc., in Virginia, on the theory that, on the system average basis, those items could be related to miles traveled in Virginia. It is petitioner's contention that the State cannot favor Virginia purveyors and compel petitioner to purchase any commodity in Virginia or suffer a penalty for failure to do so, as such a law is not a proper means for collecting compensation for the use of highways but is a clear regulation of interstate commerce in commodities, which regulation is wholly beyond the power of the State.

In *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U. S. 176, 183, 84 L. ed. 683, 688, this Court had occasion to pass on the constitutionality of an Arkansas statute imposing a tax on gasoline in the tanks of interstate motor carrier, which tax was levied under the guise of compensation for the use of highways. In discussing the subject, in a concurring opinion, Mr. Justice Stone had this to say:

> "It is no answer to the challenge to the levy to say that by altering the amount of the gasoline brought into the state for extrastate consumption appellee could so moderate the tax that it would bear a fair relation to the use of the highways within the state. In the circumstances of this case the state is without power to regulate the amount of gasoline carried interstate in appellee's tanks. It cannot be said, if that were

material, that the amount carried is not appropriate for the interstate commerce in which appellee is engaged *and it can hardly be supposed that the state could compel appellee to purchase there all the gasoline which it uses intrastate upon an interstate journey, because that would be a convenient means of laying and collecting a tax for the use of the highways. There are ways enough in which the state can take its lawful toll without any suppression of the commerce which it taxes.* In laying an exaction as a means of collecting compensation for the use of its highways the state must tax the commerce as it is done, and not as it might be done if the state could control it. Appellant cannot justify an unlawful exaction by insisting that it would be lawful if the taxpayer were to relinquish some of the commerce which the Constitution protects from state interference." (Emphasis supplied)

The observations of Justice Stone express the contentions which petitioner asserts here. Petitioner asserts that it is unwilling to relinquish some of the commerce which the Constitution protects and that the State cannot compel it to do so under the guise of exacting compensation for the use of the highways.

The practical effect of this Act *is discrimination* and it is to the practical effect of an Act that we must look.

> "The Commerce Clause forbids discrimination, whether forthright or ingenius. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best and Co.* v. *Maxwell,* 311 U. S. 454, 85 L. ed. 275-277.
>
> "The freedom of commerce which allows the merchants of each State a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language." *Best and Co.* v. *Maxwell, supra.*

The system average theory which the State Corporation Commission applies in determining petitioner's tax liability is arbitrary and capricious on its face, deprives petitioner of its property without due process of law and unreasonably burdens interstate commerce. In imposing a system average theory the State does not stop at requiring minimum purchases in Virginia in relation to miles operated in Virginia, but goes beyond and demands maximum purchases in Virginia equal to petitioner's system maximum.

This Court may judicially notice such matters as variations in topography, climatic conditions, density of population and highway traffic, and variations in the laws of states with respect to the size and weight of vehicles, in such areas as lie between Georgia and New York, as contrasted with the open countryside of Virginia. It would require no expert testimony to establish the proposition that there could in fact be as much as 19% variation in mileage per gallon of gasoline within such a territory. This 19% arbitrary is the sole basis for the attempt of the state to penalize petitioner.

The court below does not appear to have given any consideration to these matters but disposed of the issue by referring to the reports made by the carrier under the Virginia statute, in these terms: (R p 54)

> "These reports indicated on their face compliance with the Act and the deficiency was not discovered until an audit was made by the staff of the Commission. (See testimony of Masten, pages 13 and 16 of the transcript.) The company has never objected to the form of report, sought a correction, or presented a form of report different from that prescribed by the Commission."

There was nothing to advise the carrier that its reports would ever be questioned or that an audit would ever be made and, if made, that the Commission would adopt and impose by fiat a system formula, involving constructive

consumption of gasoline. The observation of the court below that petitioner did not complain when there was nothing to complain about, cannot shift any burdens to petitioner or render reasonable that which is unreasonable on its face. It is conceded that petitioner purchased in Virginia more gasoline than it used and, if important, there is nothing of record to indicate what, if any, part of the sold gasoline was used in Virginia. On the record, petitioner has not been shown to owe Virginia anything, even if the statute were valid.

The statute is applied to only interstate carriers for-hire, although on its face it purports to apply to all carriers and thereby discriminates against interstate commerce.

Under the Virginia Constitution and decision, the Corporation Commission could neither narrow the application of the statute by making it apply only to interstate carriers nor to broaden and augment the exaction by inventing a system formula. This question was considered at length in the case of *Commonwealth ex rel. Moore, Auditor of Public Accounts,* v. *P. Lorillard and Company,* reported in 129 Va. 74, 105, S.E. 683. In that case the Court had under consideration a Virginia statute imposing income tax on income derived from business done both within and without the State, and it was the contention of the Commonwealth that this situation could be cured through action taken by administrative officers limiting the scope of the statute to income from Virginia alone, ascertaining the same by methods of their own. Judge Burks, speaking for the Court in that case, said:

> "This would be legislation and not administration. Administrative officers have no such power."

The court in that case continued:

> "Taxes are imposed by the State in the exercise of its sovereign power. This power is exerted through the

legislature, and an executive officer who seeks to enforce a tax must always be able to put his finger upon the statute which confers such authority. Taxes can only be assessed, levied, and collected in the manner prescribed *by express statutory authority.* Tax Assessors have no power to make an assessment except in the manner prescribed by law, and if the statute prescribes a method of assessment, which is invalid, *the Assessor has no power or authority to adopt a method of their own* which would have been legal if it had been prescribed by the legislature." (Emphasis supplied).

We think these principles are peculiarly applicable to this case. And if indeed it be the fact that the statute as written by the Legislature is incapable of enforcement, this fact constitutes no grant of authority to administrative officers to amend it.

The statute was repealed by an act approved March 26, 1946, which repealed statute is reproduced in the appendix. The repealing statute contains no savings clause and the Supreme Court of Appeals of Virginia was duty bound to observe the repeal and to hold that upon repeal the State could go no further in its efforts to collect the judgment of the State Corporation Commission under the repealed statute.

Virginia has made three attempts to compel interstate carriers to purchase gasoline in Virginia, Acts of 1940, 1942 and 1946—reproduced in the appendix hereof. By Act approved March 13, 1940, Chapter 198 of the Acts of 1940, Virginia sought to compel carriers to purchase gasoline in Virginia and that Act did not contain an alternative provision for the payment of a penalty, per gallon, on gasoline not purchased in Virginia. The decision of this Court in *McCarroll* v. *Dixie Greyhound Lines,* 309 U. S. 176, decided February 12, 1940, rehearing denied March 11, 1940, apparently challenged the constitutionality of said

Virginia act approved March 13, 1940. On March 6, 1942, Chapter 108, Acts of 1942, the Virginia Assembly enacted the law here in issue and thereby repealed the Act of March 13, 1940. The Act of March 6, 1942 differed from the Act of March 13, 1940 in that it provided an alternative provision for the payment of a penalty of assessment per gallon of gasoline used in Virginia in lieu of purchases in Virginia. Petitioner here challenged the Act of March 6, 1942, which proceedings are now before this Court, and following such challenge the Virginia Assembly by Act approved March 26, 1946, Chapter 270, Acts of 1946, repealed the Act of March 6, 1942. The new law, while continuing the provision for purchase of gasoline in Virginia made certain provisions for abatement of taxes paid on gasoline in other states. The significance of these various acts of Virginia seems to be that Virginia has recognized the weakness of its position in the light of the decisions of this Court.

This Court has jurisdiction to notice changes in the law. In *Patterson* v. *Alabama,* 294 U. S. 600, 607, this Court said:

> "We have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered."

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Appeals of Virginia commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, the transcript of the record and proceedings herein; and that the decree of the Supreme Court of Appeals of Virginia be reversed by this

Honorable Court and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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APPENDIX A

Acts of Assembly 1940

CHAP. 198.—An ACT to require all motor carriers holding certificates and/or permits issued by the State Corporation Commission to purchase motor fuel in Virginia commensurate with the mileage traveled in this State; to require such motor carriers to make reports to the State Corporation Commission; to provide for the revocation or suspension of such certificate and permit and to prescribe for the punishment for violation thereof. [H B 267]

Approved March 13, 1940

Be it enacted by the General Assembly of Virginia as follows:

1. That each motor carrier operating in this State under and by virtue of a certificate or a permit issued by the State Corporation Commission shall purchase within the State of Virginia gasoline and/or motor fuel equal in amount to that necessary for the use of its operation as a motor carrier in this State. The State Corporation Commission is authorized to require such motor carriers to file reports, from time to time, showing the mileage traveled and the motor fuel purchased by the same.

Upon the failure of any motor carrier to purchase the gasoline or motor fuel as required by this act, the State Corporation Commission may, by its order duly entered after hearing had upon notice to the holder of certificate or permit, and an opportunity to such holder to be heard, impose a penalty not exceeding five thousand dollars upon such motor carrier, or may revoke or suspend any certificate or permit held by any motor carrier violating this act.

APPENDIX B

Acts of Assembly 1942

CHAP. 108.—An ACT to require certain motor carriers to purchase certain motor fuel in Virginia or, in lieu thereof, to make certain payments into the State treasury; to require certain reports to be made by such carriers; to provide for the administration of this act by the State Corporation Commission, to prescribe remedies for the enforcement of this act and penalties for violations; and to repeal Chapter 198 of the Acts of the General Assembly of 1940, approved March 13, 1940. [H B 124]

Approved March 6, 1942

1. Be it enacted by the General Assembly of Virginia, as follows:

Section 1. Every motor carrier operating in this State and over the highways of this State, including the streets and alleys in the cities and towns thereof, for compensation, whether engaged in intrastate or interstate commerce or both, and whether or not by virtue of any certificate or permit issued by the State Corporation Commission, shall purchase, within the State, gasoline, or other motor fuel, at least equal to that amount necessary for use in the operation as a motor carrier within the State, or such motor carrier shall, in lieu of making such purchase, pay into the treasury, for credit to the State Highway Fund, an amount equivalent to the prevailing State tax on the amount of gasoline, or other motor fuel, necessary for its operation as a motor carrier within this State over and above the amount of tax paid on gasoline, or other motor fuel actually purchased in the State.

Section 2. Every such motor carrier shall file with the State Corporation Commission (hereinafter called "the Commission") periodic reports, at such times, but not less than quarterly, and on such forms, as shall be prescribed or permitted by the Commission, showing the mileage traveled and the gasoline, or other motor fuel, purchased within the State and the amount, if any, paid into the treasury in

lieu of purchase of gasoline, or other motor fuel, as provided by this act.

Section 3. Upon the failure of any such motor carrier, as required by this act, to purchase gasoline, or other motor fuel, or to pay into the treasury an equivalent of any tax that would have been paid upon gasoline, or other motor fuel, necessary for such operation if such gasoline, or other motor fuel, had been purchased within the State, the Commission shall, by its order duly entered, after due notice to such carrier, opportunity to be heard, and full hearing, and upon the finding by the Commission that the carrier has not complied with the requirements of this act, enter judgment in an amount equal to the tax on the gasoline, or other motor fuel, which such carrier failed or refused to purchase for its operation in this State less any amount which has been paid into the treasury in lieu thereof, as provided by this act, and, in addition, shall impose a penalty not exceeding one thousand dollars, and the Commission may, in its discretion, also revoke or suspend any certificate or permit issued by the Commission and held by such motor carrier. Any amount imposed by the Commission on account of tax on gasoline, or other motor fuel, not paid indirectly or directly as required by this act, shall, upon collection, be covered into the treasury for credit to the State highway fund, and any penalty imposed, upon collection, shall be covered into the treasury for credit as provided by law in the case of other penalties. All amounts imposed by the Commission under the provisions of this act shall be collected by and under the process of the Commission.

Section 4. The Commission shall, after due notice, hearing, and opportunity to be heard, impose a penalty, not exceeding five hundred dollars, upon finding that any motor carrier, subject to the provisions of this act, has failed or refused to file any report with the Commission as required by this act, and every failure to file any such report shall constitute a separate offense. The liability to penalty hereby provided for is cumulative with, and irrespective of, any other liability or penalty provided for by this act, or by any other law.

Section 5. The Commonwealth shall have the right to proceed in the Circuit Court of the City of Richmond to recover any amount due the State on account of the failure of any such motor carrier to comply with the requirements of this act, but such action on behalf of the Commonwealth shall not preclude a proceeding before the Commission for the imposition of a penalty not exceeding one thousand dollars as in this act provided. Any final judgment of the Circuit Court of the City of Richmond, not stayed or reversed, shall be conclusive in a proceeding before the Commission against the same carrier, growing out of the same facts, for the imposition of a penalty as in this act provided. In any case in which the Commission shall have entered a judgment on account of any failure to comply with the provisions of this act, or shall have dismissed the proceeding, after hearing on the merits, no proceeding shall thereafter be instituted, nor judgment entered, in the Circuit Court of the City of Richmond, against the same carrier on account of the same default or defaults.

2. Be it further enacted, That Chapter one hundred and ninety-eight of the Acts of the General Assembly of Virginia, nineteen hundred and forty, approved March thirteenth, nineteen hundred and forty is repealed.

APPENDIX C

Acts of Assembly 1946

CHAP. 270.—An ACT to impose a road tax on certain motor carriers operating over the highways of this State; to provide for credits on such tax; to require reports to be made by such carriers; to provide for the administration of this act by the State Corporation Commission; to prescribe remedies for the enforcement of this act and penalties for violations thereof; and to repeal Chapter 108 of the Acts of the General Assembly of 1942, approved March 6, 1942.

[S B 178]

Approved March 26, 1946

Be it enacted by the General Assembly of Virginia:

1. Whenever used in this act.

(a) The term "motor carrier" means every person, firm or corporation which operates or causes to be operated on any highway in Virginia, whether engaged in intrastate or interstate commerce, or both, and whether or not by virtue of any certificate or permit issued by the Commissioner of Motor Vehicles or by the State Corporation Commission, any motor vehicle, trailer or semi-trailer for the transportation of property for compensation, whether for rent, or for hire, or as a contract or common carrier, and every common carrier and contract carrier by motor vehicle, trailer or semi-trailer of passengers for compensation. The term "motor carrier" shall not include any person, firm or corporation operating or causing to be operated any motor vehicle, trailer or semi-trailer engaged exclusively in transporting persons or property solely within the limits of any city or town in this State, or any carrier operating taxicabs or passenger motor vehicles equipped with taximeters or taxicabs or passenger motor vehicles without taximeters operated at a flat rate whose business originates wholly within the corporate limits of any city or town in this State, but which may occasionally operate beyond said limits, or public passenger vehicles offered for hire and not conforming to the definition of a taxicab, or property carrying vehicles offered for hire whose business originates wholly within the cor-

porate limits of any city or town in this State and which are occasionally operated beyond said limits.

(b) The term "Commission" means the State Corporation Commission.

2. Every motor carrier shall pay a road tax equivalent to six cents per gallon calculated on the amount of gasoline or motor fuel used in its operation within this State. Every motor carrier subject to the tax hereby imposed shall be entitled to a credit on such tax equivalent to six cents per gallon on all gasoline or other motor fuel purchased by such carrier within this State for use in its operations either within or without this State, and upon which gasoline or other motor fuel the tax imposed by the laws of this State has been paid by such carrier. Evidence of the payment of such tax in such form as may be required by, or is satisfactory to, the Commission shall be furnished by each such carrier claiming the credit herein allowed. When the amount of the credit herein provided to which any motor carrier is entitled for any quarter exceeds the amount of the tax for which such carrier is liable for the same quarter, such excess may under regulations of the Commission be allowed as a credit on the tax for which such carrier would be otherwise liable for another quarter or quarters or upon application within ninety days from the end of any quarter, duly verified and presented, in accordance with regulations promulgated by the Commission and supported by such evidence as may be satisfactory to the Commission, such excess may be refunded if it shall appear that the applicant has paid to another State of the United States or the District of Columbia under a lawful requirement of such jurisdiction a tax, similar in effect to the tax herein provided, on the use or consumption of the same gasoline without this State, to the extent of such payment in such other jurisdiction but in no case to exceed the rate per gallon of the then current Virginia State gasoline tax. Upon receipt of such application the Commission shall proceed in the manner provided in section four hundred eight of the Tax Code of Virginia, as amended, except insofar as such section may

be inconsistent with some provision hereof, to grant or deny the same, and whenever any refund is ordered it shall be paid out of the highway maintenance and construction fund.

3. The tax hereby imposed shall be paid by each motor carrier quarterly to the State Treasurer on or before the last day of April, July, October and January of each year and calculated upon the amount of gasoline or other motor fuel used in its operations within this State by each such carrier during the quarter ending with the last day of the preceding month. All taxes paid under the provisions of this act shall be credited to the highway maintenance and construction fund. The amount of gasoline or other motor fuel used in the operations of any motor carrier within this State shall be such proportion of the total amount of such gasoline or other motor fuel used in its entire operations within and without this State as the total number of miles traveled within this State bears to the total number of miles traveled within and without this State, excluding in each case the number of miles traveled in Virginia on any street maintained exclusively by any city or town.

4. Every motor carrier subject to the tax imposed by this act shall on or before the last day of April, July, October and January of each year make to the Commission such reports of its operations during the quarter ending the last day of the preceding month as the Commission may require and such other reports from time to time as the Commission may deem necessary. The Commission and its authorized agents and representatives shall have the right at any reasonable time to inspect the books and records of any motor carrier subject to the tax imposed by this act.

5. The Commission may, after a hearing had upon notice duly served not less than ten days prior to the date set for such hearing, impose a penalty, which shall be in addition to any other penalty imposed by this act, not exceeding five hundred dollars, upon any motor carrier which fails to file any report within the time prescribed which may be required by this act or by the Commission pursuant to this act, or which violates any other provision

of this act, or which fails to comply with any regulation of the Commission promulgated pursuant to this act, each such failure or violation constituting a separate offense, which penalty shall be collectible by the process of the Commission as provided by law. In addition to imposing such penalty, or without imposing any penalty, the Commission may suspend or revoke any certificate, permit or other evidence of right issued by the Commission which the motor carrier so found in default holds. Any motor carrier convicted under this section shall have the right of appeal to the Supreme Court of Appeals as in other cases of appeals of right from the Commission.

6. The taxes imposed on motor carriers by this act are in addition to any taxes of whatever character imposed on such carriers by any other provision of law.

7. Chapter one hundred and eight of the Acts of the General Assembly of Virginia of nineteen hundred and forty-two, approved March sixth, nineteen hundred and forty-two, is hereby repealed.

8. This act shall be in effect on and after July first, nineteen hundred forty-six, and the first tax to be paid hereunder shall be for the quarter ending September thirteenth, nineteen hundred forty-six, which tax shall be paid on or before October thirty-first, nineteen hundred forty-six.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1187

MASON and DIXON LINES, INCORPORATED,
PETITIONER,

vs.

COMMONWEALTH OF VIRGINIA, ex rel.
Relation of STATE CORPORATION
COMMISSION.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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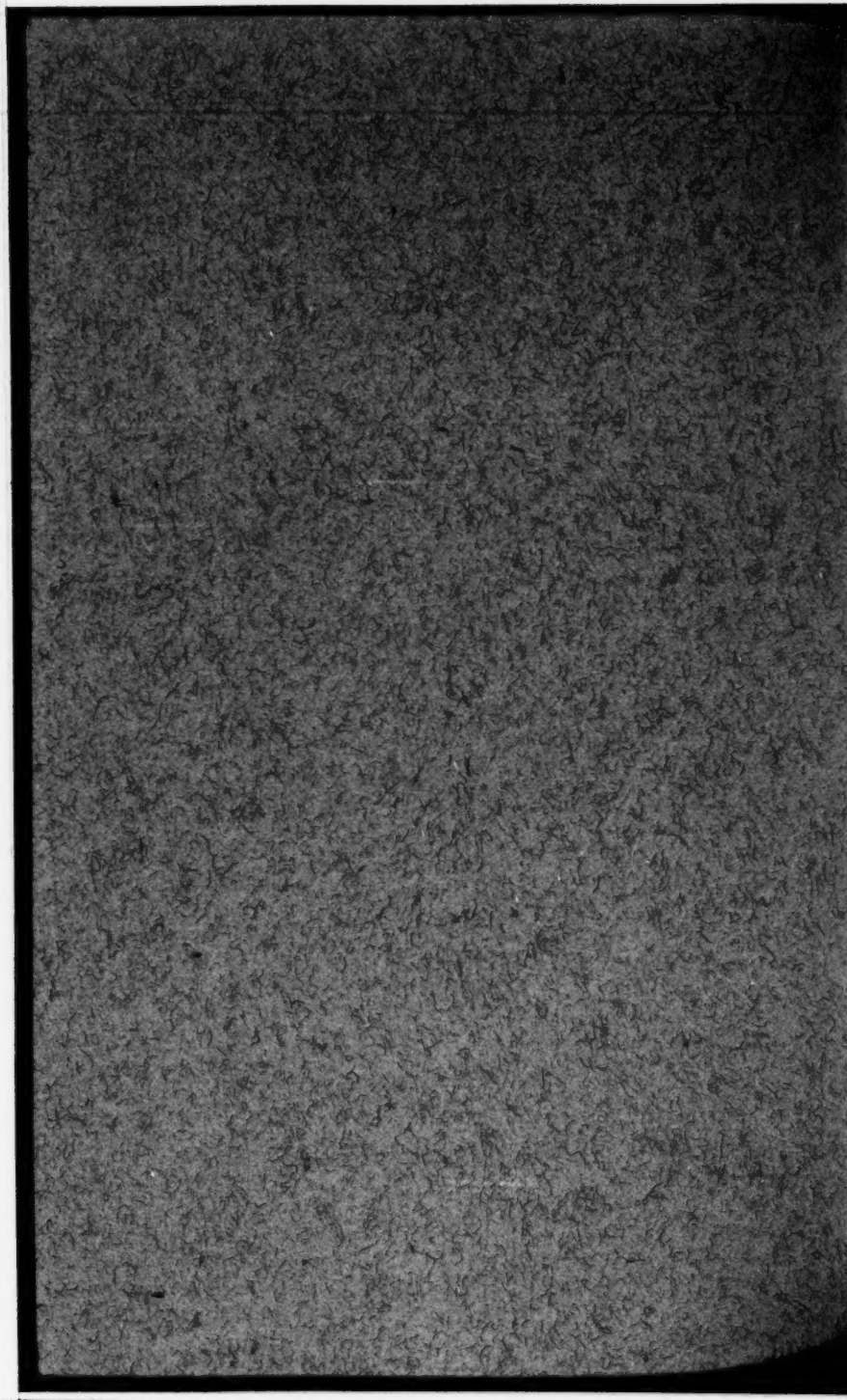

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No. 1117

MASON and DIXON LINES, INCORPORATED,
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vs.

COMMONWEALTH OF VIRGINIA, at the Relation of STATE CORPORATION COMMISSION.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

This brief is filed on behalf of respondent, Commonwealth of Virginia, at the relation of State Corporation Commission, in opposition to the granting of the writ of *certiorari* prayed for in the petition for the reason

that the case presents no Federal question of substance decided by the court below not heretofore determined by this Court.

STATEMENT OF THE CASE

Petitioner is a Tennessee corporation and a motor carrier operating over the highways of the Commonwealth of Virginia. In proceedings before the State Corporation Commission of Virginia it was determined that for the period from July 1, 1942, through December 31, 1945, the petitioner failed to purchase gasoline or other motor fuel necessary for its operation as a motor carrier within Virginia to the extent of 559,178.57 gallons and that the petitioner failed to pay into the treasury of the State of Virginia as an alternative to such purchase an amount equivalent to the prevailing State tax on the said amount of 559,-178.57 gallons of gasoline or other motor fuel, which equivalent amount was $27,958.93. (R. pp. 36, 37).

Acting under the provisions of Chapter 108, Acts of Assembly of Virginia of 1942, the State Corporation Commission entered judgment against the petitioner whereby the petitioner was ordered to pay to the Commonwealth of Virginia the sum of $27,958.93 plus a penalty of $1,000 for its failure to comply with the provisions of said Act.

On appeal by the petitioner to the Supreme Court of Appeals of Virginia the judgment of the State Corporation Commission was affirmed.

Before the State Corporation Commission and the Supreme Court of Appeals of Virginia the petitioner challenged the validity of Chapter 108 of the Acts of Assembly of Virginia of 1942 (printed as Appendix B to the petition for writ of certiorari) as being in violation of the Commerce Clause of the Constitution of the United States. It was contended that the Act required the purchase of motor fuel in Virginia and was an unlawful attempt to regulate interstate commerce. It was further contended that the statute discriminates against interstate commerce and that it violates the Commerce Clause of the Constitution of the United States in imposing a tax upon the privilege of using an instrumentality of interstate commerce.

The petitioner also contended that the evidence did not establish the amount of motor fuel necessary for use by the petitioner in its Virginia operations and challenged the method used to determine the quantity of motor fuel necessary for such use.

OPINIONS BELOW

The State Corporation Commission held that the statute imposed upon all motor carriers operating for compensation over the highways of Virginia, either in interstate or intrastate commerce, a compensatory charge or tax for the use of such highways measured by the amount of motor fuel consumed in Virginia operations; that such charge could be paid, either by buying in Virginia and paying the regular motor fuel tax thereon the motor fuel necessary for operation in

Virginia, or by paying directly into the State treasury an amount equivalent to the prevailing State tax on the amount of such fuel. It was held that, since the contribution exacted for the maintenance, construction and reconstruction of the highways provided by the State was proportionate to the use made of such highways, no unconstitutional burden was placed upon interstate commerce (See opinion of Downs, Chairman of the Commission, R. pp. 38-50).

The Supreme Court of Appeals of Virginia sustained the conclusions of the State Corporation Commission and held that the finding by the Commission as to the amount of motor fuel necessary for the petitioner's Virginia operations was supported by competent evidence. (See opinion of Chief Justice Holt, R. pp. 51-59).

THE QUESTION PRESENTED

The petitioner states five questions which he desires to present to this Court if *certiorari* is granted. The only substantial question, however, is whether the statute imposes a valid compensatory charge for the use of Virginia highways by the petitioner and others operating as motor carriers for compensation in Virginia.

ARGUMENT

I.

THE STATUTE DOES NOT REQUIRE THE PURCHASE OF MOTOR FUEL IN VIRGINIA, BUT MERELY IMPOSES A COMPENSATORY CHARGE UPON MOTOR CARRIERS USING THE HIGHWAYS OF VIRGINIA.

The petitioner contends that the question before this Court is whether the State of Virginia may constitutionally require the purchase of gasoline in Virginia. This flies squarely into the teeth of the statute and the construction placed upon the same by the State Corporation Commission and the State Supreme Court. The statute provides that every motor carrier operating over the highways of Virginia for compensation, whether in intrastate or interstate commerce or both, shall—

> " * * * purchase, within the State, gasoline or other motor fuel, at least equal to that amount necessary for use in the operation as a motor carrier within the State, or such motor carrier shall, in lieu of making such purchase, pay into the treasury, for credit to the State Highway Fund, an amount equivalent to the prevailing State tax on the amount of gasoline, or other motor fuel, necessary for its operation as a motor carrier within this State over and above the amount of tax paid on gasoline, or other motor fuel actually purchased in the State." (Acts of 1942, Chap. 108, Sec. 1.)

There is no requirement whatsoever that any motor carrier purchase one drop of gasoline in Virginia. The statute provides for two equally applicable, alternative methods, or a combination of both, by which motor carriers may pay the compensatory charge for the use of the highways of Virginia. The second alternative is in no way a penalty for the failure to purchase motor fuel in Virginia, but is simply a different method by which motor carriers may pay the compensatory charge.

The petitioner alleges that the statute demands something which its terms do not require and then argues that the statute as so erroneously construed is unconstitutional. As pointed out by the Chairman of the State Corporation Commission in his opinion (R. p. 42), if the petitioner sees fit to purchase its motor fuel requirements elsewhere, it is free to do so, but, not wishing to purchase its Virginia requirement in the State, it must contribute its fair share toward the maintenance of the highways over which it travels.

Chief Justice Holt of the State Supreme Court said in his opinion (R. p. 57):

> "In the construction of a statute, we look to its four corners. This statute would still apply if every gallon of gasoline bought by the defendant had been purchased in another State. It is for the use of the highways of the State that this tariff is assessed against it.
>
> "We are not concerned with names. It may be called a 'tax', and it may be called a 'charge' for the use of highways which the State has built. It applies to all motor vehicles operated for hire, whether engaged in interstate or intra-

state traffic. Every motor vehicle in Virginia which uses her public highways contributes in one way or another to their construction and maintenance. There is no claim that the charge in itself is excessive, and this is not affected by the fact that the motor carrier using Virginia highways purchases all of its gasoline in Tennessee or Texas. Construing the Act of 1942 as a whole, the point of its purchase is unimportant."

The Act imposes no unreasonable burden upon interstate commerce. If the petitioner, or any motor carrier whether operating in interstate or intrastate commerce, finds that it can purchase motor fuel without the State on better terms than it can do so within the State, it is free to do so. It is simply required to pay its fair share of maintaining the highways it uses in this State. The fact that it may pay a sales tax to the State in which it purchases the motor fuel is no reason it should be relieved of that obligation.

As was held by the courts below, the Act clearly imposes a compensatory charge which is not only measured by the *quantum* of use of the highways, but which is expressly dedicated to the construction and maintenance of such highways. If a motor carrier adopts the method of paying the charge by buying gasoline in Virginia and paying the regular gasoline tax on the motor fuel "necessary for use in the operation as a motor carrier in this State", the proceeds are dedicated to the maintenance and construction of highways by section 6 of Chapter 212 of the Acts of 1932, as

amended by Chapter 206 of the Acts of 1942.* If the motor carrier adopts the method of paying directly into the State treasury an amount equivalent to the prevailing State tax on the amount of gasoline "necessary for its operation as a motor carrier within this State", the proceeds are dedicated to that purpose by sections 1 and 3 of Chapter 108 of the Acts of 1942.

That such a compensatory charge for the use of public highways is valid cannot be seriously questioned. The authorities overwhelmingly support this view. The following from *Interstate Transit* v. *Lindsey*, 283 U. S. 183, 75 L. Ed. 953, 964-967,

> "While a state may not lay a tax on the privilege of engaging in interstate commerce * * * it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the

*"Section 6. Disposition of funds collected.—After providing for the refunds under this act, the director shall promptly pay all taxes and fees collected by him under this act into the State Treasury. The revenue derived from the tax levied as aforesaid is hereby appropriated for the construction of the roads and projects comprising the State primary highway system and for the construction or maintenance of the roads and projects comprising the State secondary highway system and shall be applied to no other purpose, except that there may be paid out of this fund as contribution towards the construction, reconstruction and/or maintenance of streets in cities and towns such sums as may be provided by law, and except further, that such sums out of said funds may be expended for the operation and maintenance of the highway department and the Division of Motor Vehicles as may be provided by law, provided, however, the Governor is hereby authorized to transfer out of the said gasoline tax an amount not exceeding twenty-five thousand ($25,000.00) dollars annually for the purpose of inspection of gasoline and motor grease measuring and/or distributing equipment, and/or for inspection and analysis of gasoline for purity; and there shall be paid out of this fund the amount appropriated to the Corporation Commission for the Division of Aeronautics."

> cost of constructing and maintaining them and of regulating the traffic thereon * * * . As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use * * * , *or by the express allocation of the proceeds of the tax to highway purposes*, as in *Clark* v. *Poor*, 274 U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702, *supra*, or otherwise. *Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory.* * * * " (Italics supplied).

is directly applicable on principle to the instant case when the nature and disposition of the charge here involved are considered, and the record discloses not even a suggestion that the charge does not bear a "reasonable relation to the privilege of using the highways or (that it) is discriminatory."

The above principle has been adhered to time and again. Among the many cases may be mentioned *Hendrick* v. *Maryland*, 235 U. S. 610, 59 L. Ed. 385; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245, 72 L. Ed. 551; *Clark* v. *Poor*, 274 U. S. 554, 71 L. Ed. 1199; *Ingels* v. *Morf*, 300 U. S. 290, 81 L. Ed. 653; *Dixie Ohio Express Co.* v. *State Revenue Commission*, 306 U. S. 72, 83 L. Ed. 495.

The petitioner does not deny that the charge imposed by the statute is compensatory. Nor is it contended that the imposition of such a charge violates the Commerce Clause of the Constitution of the United States. In view of the authorities sustaining such a charge the petitioner could not make such a contention with hope of success. He, therefore, contends for a construction of the statute not justified by its terms and which was rejected by both the State Corporation Commission and the Supreme Court of Appeals of Virginia. But the Virginia Supreme Court of Appeals has the final say in the interpretation of Virginia statutes and its construction will be accepted here. *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101, 104, 89 L. Ed. 101, 103. This Court, therefore, will not construe the statute differently in order to render it unconstitutional as advocated by the petitioner.

II.

The Petitioner's Attack Upon the "Formula" Used by the State Corporation Commission to Determine the Amount of Motor Fuel Necessary for Petitioner's Virginia Operations Presents No Federal Question.

The statute fixes the base or measure of the compensatory charge as the gasoline "necessary for use" in Virginia operations. The petitioner was charged with not paying into the treasury of Virginia "an amount equivalent to the prevailing State tax on the amount of gasoline or other motor fuel necessary for its operation as a motor carrier within this State (Vir-

ginia) over and above the amount of tax paid on gasoline or other motor fuel actually purchased in the State." (R. p. 10).

The uncontradicted testimony of the witness Masten, First Assistant Assessor of the Commission, is that Appellant for the period July 1, 1942-December 31, 1945, failed by 559,178.57 gallons to purchase in Virginia gasoline necessary for use in its Virginia operations, and that it likewise failed to pay into the State treasury an amount equivalent to the prevailing State gasoline tax on this 559,178.57 gallons. (R. pp. 20, 21). Thus the judgment of the Commission for failure to pay into the State treasury an amount equivalent to the prevailing tax (five cents per gallon) on this 559,178.57 gallons in lieu of the purchase thereof in Virginia was for $27,958.93. (R. pp. 20, 21, 37).

And on cross-examination by Mr. Shelton Mr. Masten further testified as follows (R. 27):

> "Q. Are you able to give the Commission, Mr. Masten, the amount of gasoline or motor fuel which was necessary for their operation in the State of Virginia over the period in question?
>
> "A. Yes, sir.
>
> "Q. Sir?
>
> "A. Yes, sir.
>
> "Q. What was that amount?
>
> "A. 2,940,563.67 gallons.
>
> "Q. May I ask how you arrived at that figure?
>
> "A. By taking the total number of miles traveled as compared with the total miles traveled in Virginia to determine the percentage of operation in Virginia and applying that percentage to

the total number of gallons of motor fuel purchased by the Company."

There was not a shred of evidence that the "formula" was not accurate. The petitioner's auditor testified in the case, but not as to the amount of gasoline necessary for petitioner's Virginia operations. If the formula had not been reasonably accurate, petitioner could have presented evidence to substantiate its contention.

The question before the State Supreme Court was whether the evidence supported the finding as to the amount of gasoline necessary for the petitioner's Virginia operations. That court held that the finding was sustained by satisfactory evidence. (R. p. 59). The record presents no basis for a review of this question here.

III.

The Statute Applies to Intrastate Carriers as Well as Interstate Carriers and In No Way Discriminates Against the Latter.

The statute expressly applies to intrastate carriers as well as interstate carriers. See Appendix B to the petition. The petitioner's charge that it is applied only to interstate carriers is utterly without foundation and we do not understand the basis for the same. If an intrastate carrier purchases without the State gasoline necessary for its operations within the State, it must

pay an amount equivalent to the State tax on such gasoline just as is the case with an interstate carrier.

As stated in the opinion of the State Corporation Commission, the statute is in terms applicable to intrastate motor carriers as well as to interstate carriers and nowhere in the record is there evidence tending to show either affirmatively or by inference that any discrimination is practiced to the detriment of interstate operators.

CONCLUSION

For the reasons stated it is submitted that the petitioner does not present a case wherein the court below decided a Federal question of substance contrary to the applicable decisions of this court, but on the contrary the only Federal question presented has been decided by the State court in line with the decisions of this court and that, therefore, the petition for a writ of *certiorari* in this case should be denied.

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